An Analytical Discussion of the Promise of Sale and Related Subjects, Including Earnest Money

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To Pothier, whose views on the subject were followed in the redaction of the Code Napoleon, a promise of sale was a unilateral contract. It was binding on the promisor, but imposed no promise or obligation on the part of the promisee. He offered an illustration as follows “For example, if in the contract of sale that I make to you of my library there is this clause ‘I obligate myself also to sell to you the shelves if you wish to buy them.’ this clause constitutes a promise to sell you the shelves.” And he continued, “There is a big difference between the promise to sell and the sale itself. He who promises to sell you a thing does not then sell it, he merely contracts the obligation to sell when you require him to do so. The contract of sale is a bilateral contract by which each of the parties obligates himself to the other. but the promise of sale is an agreement by which only he who promises to sell obligates himself, he to whom the promise is made does not contract any obligation.” Planiol held the same view. “Let us therefore consider the promise of sale as a unilateral convention. There is no sale yet since there is no buyer. There is a single obligation contracted by the owner who alone is obligated in promising to sell.” And he gave a similar illustration.3

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1. 3 ŒUVRES DE POTHIER, TRAITÉ DE CONTRAT DE VENTE nos 476, 478 (2d ed. 1861). “476. Une promesse de vendre est une convention par laquelle quelqu’un s’oblige envers un autre de lui vendre une chose.

    ‘Par exemple, si, dans le contrat de vente que je vous ai fait de ma bibliothèque, il y a cette clause, ‘que je m’oblige de vous vendre aussi les tablettes, si elles vous conviennent, et si vous voulez les acheter’, cette clause renferme une promesse de vous vendre les tablettes.

    ‘Il y a une grande différence entre la promesse de vendre et la vente même. Celui qui vous promet de vous vendre une chose, ne la vend pas encore, il contracte seulement l’obligation de vous la vendre lorsque vous le requérez.’”

    “478. Le contrat de vente est un contrat synallagmatique, par lequel chacune des parties s’oblige l’une envers l’autre, mais la promesse de vendre est une convention par laquelle il n’y a que celui qui promet de vendre, qui s’engage, celui à qui la promesse est faite ne contracte de sa part aucune obligation.”

2. 2 PLANIOL, CIVIL LAW TREATISE, AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE no. 1401 (1959). See also 5 Aubry et Rau, Droit Civil Francais 4-5, no. 349 (6th ed. 1946).

3. 2 PLANIOL, op. cit. supra note 2, at no. 1399.
Perhaps no clearer statement of the legal nature of the "option" of our modern law could be made. The one to whom the option is given acquires a right to buy the thing covered by the option without the assumption at the time of a corresponding duty. The resulting contract is consequently unilateral. It seems clear, therefore, that the promise of sale, as understood by Pothier, amounted to what is now known by us as an option. Indeed, modern French writers speak of the right given to the promisee of the promise of sale as an option.\(^4\) And just as an exercise of the option produces a bilateral contract, so also, when the buyer avails himself of the promise of sale, a bilateral contract results, as Pothier pointed out. In both cases the buyer has a right that the seller shall deliver the property to him and the seller is under a duty to do so; in addition, the seller has a right that the buyer shall pay the price and the buyer is under a duty to do so.

In Pothier's time some controversy existed over the question of whether a promise of sale was specifically enforceable.\(^5\) This stemmed from the further question of whether an order of specific enforcement would compel the promisor to do something inasmuch as a decree of this kind was not favored because of the necessary interference with one's personal liberty. By way of answer, Pothier pointed out that no such interference would result from a decree of specific enforcement because in such a case the personal action of the seller is not required, but his obligation "may be sanctioned by a judgment ordering that, in the absence of the debtor's willingness to execute the contract of sale, the judgment will stand for the contract."\(^6\)

The redactors of the Code Napoleon adopted Pothier's view and expressed it in Article 1589 simply by providing that a promise of sale amounts to a sale when there exists the reciprocal consent of both parties on the thing and the price. That is, when the option holder consents to take the property, there is a con-

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4. Id. no. 1401: "In practice the promise of sale takes different names. The name 'option' is given to the right of the creditor to declare within a certain delay that he intends to realize the promise." 5 Aubry et Rau, op. cit. supra note 2, at no. 349: "La déclaration de la volonté d'acheter, appelée couramment l'option peut être implicite, et n'est soumise à aucune forme, sauf stipulation contraire."

5. 3 Œuvres de Pothier, op. cit. supra note 1, at no. 479.

6. Ibid.: "Mais le fait qui est l'objet d'une promesse de vendre, n'est pas un fait extérieur et corporel de la personne du débiteur; il peut le supplier par un jugement, comme nous l'avons rapporté, qui ordonnera que, faute par le débiteur de vouloir passer un contrat de vente, le jugement vaudra pour contrat." See also 2 Flaniol, op. cit. supra note 2, at 1406.
currence of consent and the promise of sale is converted into a sale. They had already provided in Article 1583 that the sale is perfect between the parties and the property is acquired of right by the buyer with regard to the seller, from the time there is agreement on the thing and the price, although the thing has not yet been delivered nor the price paid. Consequently, and in harmony with this principle, under the law of France, when a promise of sale is taken up by the buyer's giving his consent to buy, the sale is perfected and ownership passes to the buyer. As the owner he is entitled to a judgment of possession. If delivery of the thing and payment of the price are to be performed concurrently, he must pay or tender payment of the price; but this bears only on his right to possession not his ownership of the thing. So that by providing in Article 1589 that the promise of sale amounts to a sale after the buyer gives his consent to buy, specific enforcement was sanctioned.7

It is to be observed that Article 1589 does not undertake to define a promise of sale. It simply recognizes that, when the consent of the buyer to buy is joined to the seller's consent to sell, a sale results. Until the consent of the buyer is given, the agreement is simply a promise of sale, or, in more familiar terms, a unilateral option contract. Unfortunately, confusion has resulted over the true nature of the promise of sale apparently because it was considered necessary, in order to overcome any doubt as to whether a promise of sale was specifically enforceable, to provide in Article 1589 that a sale results when the buyer gives his consent to buy.8

7. See 2 Planiol, op. cit. supra note 2, at no. 1406: "The Code has further simplified the situation: 'The promise of sale is equivalent to sale,' says Article 1589. Therefore, it is the promise itself, as soon as the consent of the buyer is joined to it, which constitutes the contract of sale. . . . If the promisor refuses to deliver the thing it is necessary, as in the time of Pothier, to resort to the courts to obtain a judgment; but the judge no longer need condemn the vendor to execute a contract as formerly; the court simply finds the existence of the promise of sale and the consent of the buyer, and orders that he be sent into possession."

Of course, since a matter of public order is not here involved, the parties could agree to the contrary, as the French clearly recognize, but in the absence of such a contrary agreement the principle applies.

8. See 2 Planiol, loc. cit. supra note 2; 2 Colin, Capitant et de la Morandiere, Traité de Droit Civil nos. 831, 832, 834, 843 (10th ed. 1953): "834. Promesse synallagmatique de vendre et d'acheter. — Un propriétaire promet de vendre son bien moyennant un prix déterminé, et celui à qui il fait cette promesse s'engage de son côté à l'acheter au prix fixé. D'après l'article 1589, cette double promesse vaut vente. En effet, chacun des contractants s'est obligé, l'un à vendre, l'autre à acheter. Il y a donc engagement réciproque, c'est-à-dire contrat synallagmatique.

"Mais quel est, au juste, le sens de cette formule que la promesse de vente vaut vente? Deux opinions ont été soutenues sur ce point:"

"A.—D'après les premiers commentateurs du Code Civil, l'article 1589 sig-
But if the promise of sale of French civilian law is simply the
common law option, the legal requisites of the two are not the
same. This results from the difference between cause and con-
sideration. The common law option is easily distinguished from
a simple offer because it is supported by consideration and the
simple offer is not. Since this distinction is not possible under
the French theory of cause, it is necessary to determine whether
there is any difference between a simple offer and a promise of
sale under that system.

In France an offeror can render a simple offer irrevocable
simply by an expression of will to that effect or by making the
offer under circumstances which give rise to the inference that
he intends to allow the offeree a period of time within which to
accept the offer. He has the legal capacity to so bind himself
if he sees fit to do so without seeking or receiving anything in
return. As Loisel put it, “On lie les boeufs par les cornes et les
hommes par les paroles.” The standard discussion of this prob-
lem in the writings of the French centers merely around the
proper explanation of the principle, not its existence. Three
views have been offered. One is that the offeror is bound on a
delictual basis if he revokes his offer without giving the offeree
the benefit of the time allowed for acceptance. Another is that
the offeror becomes bound by a preliminary contract stemming
from a presumption of willingness of the offeree to avail himself
of the opportunity to consider the offer within the time allowed.
The third and more realistic is that the offeror binds himself by
the sole effect of his will. But whatever view is taken, the

9. See, generally, Smith, A Refresher Course in Cause, 12 LOUISIANA LAW
REVIEW 2 (1951).
10. 3 TOULLIER, LE DROIT CIVIL FRANCAIS no. 30 (1846), 2 COLIN ET CAPI-
offeror is not privileged to revoke his offer during the time allowed for its acceptance. Yet it does not follow from this that the simple offer is a promise of sale, or unilateral contract:

In the illustration given by Pothier, the lessor's promise of sale is given in return for the lessee's consent to lease the premises, which fact would, indeed, satisfy the requirement of common law consideration, but no such legal support is needed to render it effective. The contract known as a promise of sale can be created in French civilian law although nothing may be given by the promisee to the promisor that would constitute consideration in the common law sense. The promisor simply has the legal capacity to enter into a unilateral contract with the buyer by offering the latter a period of time for deliberation, and by receiving in return his consent to avail himself of the opportunity. If this happens, a contract results because, in French law, a concurrence of wills, other factors being present, will produce a contract. And herein lies the difference between a simple pollicitation and a promise of sale: the latter is based on a concurrence of consent which is not present in the former. The seller's willingness to extend the option to the buyer may rest on something given to the seller in return, as, for example, taking a lease, or, for that matter, making a present payment, or it may rest on his will alone. Even if the cause of the granting of the option lies merely in a spirit of generosity, it is nevertheless valid. The resulting contract is binding without satisfying the requirement of the authentic act because, since there is no depletion of the patrimony of the promisor, he is not donating. But since the promise of sale, or option, is itself a contract, the death of the promisor will not terminate it, speaking generally, any more than the death of any contracting party will terminate his obligations. A simple pollicitation, on the contrary, even though irrevocable by the offeror, will terminate with his death or supervening incapacity.

A clear expression of the foregoing will be found in Aubry & Rau's treatise on the French civil law. It is there said, "A promise to sell, not yet accepted, forms only a simple pollicitation. ... But a promise to sell may be accepted without a reciprocal engagement by the buyer and becomes by such acceptance obligatory on the promisor. It is called a unilateral promise of sale. ... The benefit of the promise is susceptible of being assigned unless there is a contrary stipulation. The promise is
transmissible in case of death, actively and passively." On the other hand, in speaking of a simple offer, the authors say: "As far as the acceptance of it is concerned, it may, in general, be given as long as the offer has not been validly withdrawn. This rule is subject to an important exception when the offerer has fixed a delay for its acceptance, in which case he will be released from it only when his offer has not been accepted within the delay fixed. On the other hand, the acceptance may not take place effectively after the death of the offerer or when he has lost, in fact or in law, the necessary capacity to persevere in his will."

Additional doubt has arisen in French civilian law concerning the legal consequence of the subjection of one of the promises in a bilateral contract to a purely potestative condition or condition the occurrence of which depends on the will of the promisor. For example, if A, with a view to inducing B to give his consent to buy in return, promises to sell his farm to B, and B promises to buy it if he wishes, the latter's promise is subject to a purely potestative condition in that performance of the promise to buy rests on his will alone. The result of this is that since A's promise is offered only in return for B's promise, and B does not in fact promise anything, A's will is vitiates and he is himself not bound. The common law would explain that there is no consideration to support A's promise because the promise given to him in return is wholly illusory and that a promise unsupported by consideration is not binding. But since the requirement of consideration is not present in French civilian law, no such easy distinction is possible. In the latter system the difference lies in the fact that, a bilateral contract being contemplated, the legal foundation for A's promise rests in his receiving a return promise from B, which constitutes a condition of the binding effect of the former. This is true because, basically, in the example given, the cause or motive of A's promising to sell

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11. Aubry et Rau, op. cit. supra note 2, at 7, no. 349. Planiol (op. cit. supra note 2, at no. 1401) makes an equally clear analysis: "This promise is not a simple offer... It constitutes a definitive engagement since it has been accepted by the other party. It is therefore a special contract which has its own nature and effects and which bears the name 'the promise of sale.' It is not yet a sale but the sale will perhaps one day be completed by the adherence of the buyer, if he desires."

12. Aubry et Rau, Droit Civil Francais no. 343 (1946).


is to get B's present promise to buy in return and, since he does not, his own promise rests on a false cause and is unenforceable. It is to be observed that this discussion deals with an offer for a present bilateral contract where the legal support for each promise is found in the other. However, as already observed, a promise of sale historically speaking is a unilateral contract the binding effect of which is not made to rest on the promisor's receiving at the time a return promise to buy. The buyer's right of property in the thing the seller promises to sell is, of course, conditioned on his consenting to buy, but this consent is not required to render binding the promise of sale itself for the simple reason that the promisor does not so intend. He gives his promise to allow time to the promisee not in return for a present commitment to buy but because it is simply his will to do so whatever his purpose may be. In consequence, it cannot be said that, because he does not get a present promise to buy, his will is vitiated and the cause of his promise is false.

Perhaps the difference of opinion encountered among the French writers themselves over the question of whether where promises are exchanged and one of them is subject to a purely potestative condition the other may yet subsist, stems from an inadequate analysis of the cause of the undertaking in question, or, put another way, the failure to distinguish between a bilateral contract where each promise is made to rest on a return promise and a unilateral contract where no return promise or undertaking is sought. Certain it is that, under a system where only an exchange of consent is necessary to create a contractual obligation, the nature of the contract is controlled by its cause. In any event, the legal significance of the potestative condition relates to bilateral contracts, not unilateral like the promise of sale.

It seems clear, however, that the foregoing does not represent an accurate appraisal of the law of Louisiana. The promise of sale, irrevocable simple offers, contracts to sell, and sales have proved to be troublesome concepts. The redactors of our Civil Code of 1825 included verbatim the language of Article 1589 of the Code Napoleon but added a provision making it clear that the required elements of a sale must be included in the promise of sale, and that the formal requirements of Article 2440 of our code must also be satisfied. However, in 1910 the article was

15. See Smith, supra note 9, at 30-31.
16. See Brown, Potestative Conditions and Illusory Promises, 5 Tul. L. Rev. 306, 401-02 (1931), and authorities there cited.
17. These additions may have been designed to take care of certain difficulties
amended so as to read in part that when there is reciprocal consent the promise of sale "so far amounts to a sale as to give either party the right to enforce specific performance of same." This portion of the amendment did not, it will be observed, touch the legal nature of a promise of sale, but simply dealt with the legal consequences which would follow the giving by the buyer of his consent to buy. Whereas under the French version the sale would be perfected and the property in the thing would be acquired by the purchaser's giving his consent, our amendment changed this consequence in a negative way by limiting the effect of acceptance to the acquisition of a right to specific performance. Therefore with us the result is a bilateral contract to sell, but not a sale, since the latter involves a transfer of ownership.

In addition, however, a second paragraph was added to the article, reading, as amended in 1920: "One may purchase the right, or option to accept or reject, within a stipulated time, an offer or promise to sell, after the purchase of such option, for any consideration therein stipulated, such offer, or promise can not be withdrawn before the time agreed upon; and should it be accepted within the time stipulated, the contract or agreement to sell, evidenced by such promise and acceptance, may be specifically enforced by either party."

Although this portion of the article, as amended, does not explicitly say that an irrevocable promise of sale cannot be made without anything of value or any consideration being given for it by way of purchase, nevertheless it carries that implication. In consequence, a fair inference seems to arise that unless a promise of sale has been purchased for some consideration it will not become irrevocable. This, obviously, is contrary to the source of our law.

The amendment may have been designed to bring the Code into harmony with the understanding of the existing law by the profession. The case law had been treating a promise by a seller to sell coupled with a promise by a buyer to buy as a promise of sale. We seem to have backed into this position as a result of discussed by Pothier. See 3 OEUVRES DE POTHIER, op. cit. supra note 1, at nos. 481-483, and 2 PLANIOl, op. cit. supra note 2, at no. 1407.

18. 2 CoL1N, CAPITANT ET DE LA MORANDIERE, op. cit. supra note 8, at no. 832: "Promesse unilatérale de vendre ou d'acheter.—Il y a promesse unilatérale de vente lorsqu'un propriétaire s'oblige à vendre un bien moyennant un prix déterminé à une personne, au cas où celle-ci voudrait l'acquérir. . . .

"(B) Plus exacte est l'opinion que place la conclusion de la vente au moment où le preneur, déclare se prévaloir de la promesse a lui faite (déclare lever l'option consentie en sa faveur, selon une expression souvent usitée en pratique.)"
adopting the view that a bilateral agreement to sell and to buy, where a formal act of sale is to be executed at a later date, does not constitute a sale, but merely gives rise to an action of specific performance. In consequence, the agreement, under the influence of Article 2462, was called a promise of sale. This usage may have been encouraged by the fact that Article 2462 as originally worded invited misconception. It spoke of reciprocal consent; hence it was easy to conclude that a promise of sale involves reciprocal consent; yet it actually provided merely that when there is reciprocal consent, that is, after the buyer consents to buy, the promise of sale is converted into a sale.

Whatever the reason or reasons why we came to consider a promise of sale as bilateral, by doing so we seem to have been driven to the conclusion that our law, prior to the 1910 amendment to Article 2462, did not recognize unilateral option contracts. This appears to have been the reason why a new paragraph was added to the article to deal with such contracts. Considering the fact that the illustration given by Pothier, whose

19. This view seems to have been dictated by what were counted as policy considerations. See Peck v. Bemiss, 10 La. Ann. 160 (1855); McDonald v. Aubert, 17 La. 448 (1841). See also Comments, The Effect of Article 2462 of the Louisiana Civil Code, 3 Louisiana Law Review 629 (1941), and Perfection of Public Sales, 17 Louisiana Law Review 197 (1956).

Ownership cannot be described except in terms of the legal relations between the "owner" and other persons. Hence a transfer of ownership is purely a legal effect attached to the manifestations of the parties. It may take place at a time provided by the law or the parties may be given the power of selecting the time. 11 Beudant, Cours de Droit Civil Francais no. 19 (2d ed. 1934). Louisiana has not been too generous in giving recognition to the power of the parties to exercise such control presumably, again, for reasons of policy. See Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 So. 193 (1908). But see American Creosote Works v. Boland Machine and Mfg. Co., 213 La. 884, 35 So.2d 749 (1948). In theory, delivery of an act of sale is no more necessary to a vesting in the buyer of the attributes of ownership, as between the parties, than is actual or constructive delivery of a movable.

20. 2 Colin, Capitant et de la Morandiere, op. cit. supra note 8, at no. 851: "La promesse de vente n'est pas encore une vente. C'est un avant-contrat, par lequel le créancier obtient le droit d'acquérir la chose quand il le jugera bon. Cependant, l'article 1589 semble assimiler les deux opérations, car il dit: 'La promesse de vente vaut vente lorsque y a consentement réciproque des deux parties sur la chose et sur la prêts.' En réalité, ce texte vise non pas la promesse de vente proprement dite, ou promesse unilatérale, mais la promesse synallagmatique de vendre et d'acheter qui elle, est bien une vente. . . ."

Of course, it would not be inaccurate to refer to a promise of sale as a contract to sell since it produces a conditional right-duty relationship. This is what we call an "option." The term "contract to sell" is ordinarily applied to a bilateral contract to sell and to buy which does not result in a "sale," or transfer of ownership. The use of the term "contract to sell" as contradistinguished from a "sale" is not encountered in the writings of the French presumably for the reason that ordinarily an agreement to buy and to sell results in a transfer of ownership, or sale, as shown in the first paragraph of this note wherein the authors use the expression "promesse synallagmatique de vendre et d'acheter."

views were so influential in the redaction of the French Civil Code, would constitute an ordinary common law option, supported by consideration, and at the same time would be perfectly sound French civilian law, this was a strange development. But it occurred, and in the process, the requirement that the option be purchased "for any consideration therein stated" was also incorporated. This could have been designed to change the Civil Code, or to adopt what was deemed to be the case law, or it might have resulted simply from an inadequate appreciation of the theory of cause and its recognition of the binding efficacy of the will. In any event, by virtue of the prior jurisprudence and the amendment we have parted company with the traditional French civilian theory in two respects: (1) a promise of sale does not ripen into a sale upon a concurrence of thing, price, and consent, but merely gives rise to a binding contract to sell on the date agreed for the confection of an act of sale; and (2) a unilateral contract giving rise to an option to purchase now requires consideration.

At the same time, our law relating to simple offers has been immersed in doubt. Article 1809 of the Louisiana Civil Code recognizes that a simple offer may be made with a period of irrevocability. Accordingly, if an offer contains an expression of willingness to give the offeree a time for acceptance, or the circumstances of the case give rise to a presumption that such is the offeror's intention, the offer will be irrevocable although it will terminate with the offeror's death. This is, of course, unadulterated French civilian law. But our jurisprudence has been reluctant to give Article 1809 its historical meaning and effect. Perhaps the influence of the common law doctrine of consideration has been too pervasive and persuasive for the bar, the

22. In a broader sense our law has always recognized the power of contracting parties having the requisite legal capacity to bind themselves in any way they see fit as long as they do not offend against any prohibitory law or public order and good morals. LA. CIVIL CODE art. 1764 (1870). Inasmuch as there has never been anything in the Code to prohibit an option it would seem to follow that such a contract has always been possible in Louisiana. The Code Napoleon does not expressly provide for the promise of sale, yet it has been recognized as a valid unilateral contract since a time long prior to the adoption of the code. It is referred to in Arts. 1589 and 1590 for more particular purposes. The provisions of our Code were the same prior to 1910. LA. CIVIL CODE arts. 2462, 2463 (1870).
24. LA. CIVIL CODE arts. 1809, 1810 (1870).
bench, and the legislature as well. As has been noticed, the amendment to Article 2462 gives support to this policy at least as far as offers to sell are concerned. And its language will not permit the conclusion that it was designed merely to provide for an irrevocable offer, or option, that would survive the death of the offeror. It provides in substance that when an offer to sell is supported by consideration "it cannot be withdrawn before the time agreed upon," which means that the proposer may not withdraw it. Yet under the circumstances stated in Article 1809 even a simple offer that will expire with the death of the offeror may not be withdrawn. Consequently, it is not believed that the amendment was born of the limited purpose to provide for a proposal that would survive the death of the proposer. In any event, it does make it clear that an option must be supported by consideration not only to survive the death of the promisor but also to terminate his power of withdrawal.26 And from this it appears clearly to follow that offers to sell have been withdrawn from the coverage of Article 1809 and may be revoked notwithstanding that article unless supported by consideration. This being true, our law is now the same in this respect as the common law.

To sum up these matters in terms of the legal relations, under the French solutions the following analysis would be descriptive. The promise of sale gives rise to a conditional duty in the promisor to deliver the property subject to the buyer's subsequently consenting to buy it, although the promisor continues to possess the power, but not the privilege, to make a valid sale to another.27 The buyer has a conditional right to the delivery, the condition being that he give his consent to buy, and a right that the seller shall not sell to another although he does not enjoy an immunity against a resale of the property by the promisor in the meantime. He has also the legal power to convert the promise of sale into a sale by giving his consent to buy. At this stage

26. It seems clear that the "consideration" required by this provision means consideration in the common law sense of something given in exchange for the promise in a bargaining transaction and not "cause" in the French civilian sense of "motive." See LA. CIVIL CODE art. 1896 (1870), and cf. RESTATEMENT OF CONTRACTS § 75 (1932). The phrase, "for any consideration therein stipulated," was substituted by the 1920 amendment for the phrase, "for value," which was used in the 1910 amendment.

27. It appears that French law does not provide for the recordation of the promise of sale itself so as to protect the promisee against a sale to another. Effective recordation is possible only after the buyer consents to buy. 2 COLIN, CAPTANT ET DE LA MORANDIERE, op. cit supra note 8, at no 832, p. 595, and cases there cited. This is because the unilateral promise of sale does not create a real right, or right of ownership.
there is no reciprocal right in the seller that the buyer shall buy
nor corresponding duty in the buyer because the contract is
unilateral. When the buyer exercises his power the promise of
sale ripens into a sale and ownership passes by operation of law.
The seller's duty to deliver becomes unconditional as likewise
becomes the buyer's right to possession of the thing in which he
now has a real right. The buyer comes under a duty to receive
the delivery and to pay the price and the seller has a correspond-
ing right. The resulting contract is therefore bilateral. These
consequences follow where the parties have not agreed differently
with respect to the vesting of ownership which power they
enjoy.

With us, when an option to buy an immovable is purchased
"for any consideration therein stipulated" the relations are the
same as those just described for the promise of sale of the French
law except that, by recording the option, an effective sale to a
third party can be precluded. However, when an option is taken
up in Louisiana ownership does not then pass but its transfer is
deferred until the delivery of the act of sale. The seller is under
a duty to make such delivery, at which time ownership will vest
in the buyer, and the buyer is under a duty to take and pay. In
short, the exercise of an option converts a unilateral promise of
sale into a bilateral contract to sell but not into a sale as in
France.

Although the unilateral promise of sale may be created in
France without any consideration bargained for and received
by the promisor in return for his agreement to give the buyer a
period of time for acceptance, the same is not true under our
law. By the same token, if a simple offer to sell is made and
the offeror states that it will remain open for a period of time,
it is, presumably, nevertheless subject to withdrawal. Conse-
quently, whereas in France the offeror would not be privileged
to revoke the offeree's power of acceptance, he would have such
a privilege here.

The legal relations arising from a common law option are the
same as those created by the promise of sale of French civilian
law. The only difference rests in the requirement of considera-
tion to support the former. If the option is exercised, according
to the rule followed at common law in the majority of jurisdic-
tions, legal title remains in the vendor, but the purchaser ac-
quires an equitable title which results in a shifting of the risk to
him.\textsuperscript{28} In Louisiana title or ownership is in the vendor and the risk remains with him. In France ownership and risk are in the purchaser.

The impact of the theory of earnest money in this area has been beset with similar difficulties. This is due in part to the fact that the concept of earnest money is related in the French Code and that of Louisiana to the promise of sale. Article 1590 of the former, which is followed in Article 2463 of the Louisiana Code, provides that “if the promise of sale has been made with earnest money, each of the contracting parties has control over his own withdrawal; he who has given the earnest money by losing it, and he who has received it, by returning the double.”

At first blush the giving of earnest money in connection with a unilateral option contract seems somewhat puzzling. However, a closer examination of the problem reveals some support for the code provisions. As has been noticed, under Article 1583 of the Code Napoleon an agreement for the sale of a particular thing at a fixed price has the effect of transferring ownership from the seller to the buyer and is, therefore, a sale. Article 1589 is entirely consistent with this principle in providing that when the promisee of a promise of sale gives his consent to buy, thus producing a concurrence of thing, price, and consent, a sale occurs. Now, according to Pothier, a deposit of earnest money, intended as a forfeit, accompanies a projected sale rather than a present one.\textsuperscript{29} That is, a buyer who puts up earnest money does not then consent to take the thing, but simply agrees to forfeit the deposit if he decides not to take it. Consequently, the transaction is not to be counted as a sale for lack of consent to buy by the purchaser and, therefore, remains simply a promise of sale. To illustrate, such an agreement might be framed by the seller's proposing to the purchaser, "I will sell my farm to you and will give you fifteen days in which to make up your mind. However, you must put up $100.00 with the understanding that if you decide not to buy, I may keep the sum deposited. On the other hand, I may withdraw my promise, but if I decide to do so I will return to you double the amount put up.” This is a proposed promise of sale accompanied by the giving of earnest. When the buyer puts up


\textsuperscript{29} \textit{3 Oeuvres de Pothier, op. cit. supra} note 1, at nos 496-500.
the money the result is a unilateral contract. The seller has assumed a duty, although he has the power to terminate it, whereas the buyer has not obligated himself. From a practical point of view one of the parties may be no more bound to sell than the other to buy; nevertheless, as the agreement is framed, the analysis is accurate. If the seller foregoes his power of withdrawal and the purchaser elects to buy, then under the French Code a bilateral contract results and the buyer acquires ownership although the thing has not yet been delivered or the price paid.

The giving of earnest money may properly be related, therefore, to the promise of sale. However, to do so exclusively is unjustifiable. It may be given as well in connection with a bilateral contract. To illustrate, a seller may agree to sell and a buyer to buy in connection with which the latter may put up earnest money as a forfeit subject to the understanding that he may elect not to perform his obligation to buy but to forfeit the earnest money instead and the seller may likewise elect not to perform his obligation to sell by forfeiting a like sum, which means returning the double. In such event, each party assumes an obligation in form although each reserves a power of withdrawal. Because mutual obligations are assumed, the power of withdrawal given to each party is resolutory in nature; an exercise of it will resolve or terminate the existing obligations. If the power of withdrawal is not exercised, the promises will remain fully effective and no further agreement is necessary. It seems entirely proper to say that each party is under an obligation, notwithstanding that he may have the choice between performing or forfeiting the amount of the deposit. A person may be counted properly as under an obligation to render a performance to another although in the final analysis he may have the choice between performing or paying damages for nonperformance. This is indeed the choice every contracting party has if his obligation is not specifically enforceable. A seller returning the double of earnest money deposited by the buyer is exercising such a choice, and the buyer is in the same position although he has already put up the forfeit.

A buyer who deposits earnest money under a promise of sale is then simply in a position where he will lose the earnest money if he does not take up his option within the time allowed, in which event the seller simply retains it. But where earnest money is put up in connection with a bilateral contract to sell, the seller cannot of his own motion declare a forfeiture of the earnest
money and proceed as if no obligation to sell had been entered into. On the contrary, since the resolution of contracts must be sued for, he must sue to have the contract resolved and the earnest money declared forfeited to him.\textsuperscript{30}

The difference between the two foregoing cases is believed to account for the discussion found in certain French writings concerning whether a deposit of earnest money operates to suspend the sale under a bilateral agreement, or whether ownership passes but will be resolved in the event of an election to forfeit the deposit.\textsuperscript{31} This question cannot arise when earnest money is deposited in connection with a promise of sale, or option, because there can be no sale, that is, no transfer of ownership, until the buyer gives his consent to buy, and when he does so he is electing not to forfeit. But because a sale results when two parties in France exchange their consent to sell and to buy a certain thing at a fixed price, the question of whether this consequence will follow if earnest money has been deposited under such an agreement must be resolved.

The reason of the matter supports the view that by putting up earnest money it should be taken as the intention of the parties that ownership is not to pass until the election is made. Forfeit money in such a case is given to secure the privilege of withdrawing and as long as it is doubtful whether performance will be rendered, it seems incontestably better to say that the transfer of ownership is suspended. It is to be observed that although a withdrawal will here operate as a resolutory condition to the existence of the contract consisting of the mutual promises, the election by both parties to perform operates as a suspensive condition to the transfer of ownership thereunder, or the perfected sale. Put another way, viewed contractually, the condition is resolutory, but from the standpoint of the transfer of property in the thing, it is suspensive. In other words, that which is suspended is a right of property and the enforceability of the duty to deliver and the duty to pay.

Adverting to the deposit of earnest money in connection with a promise of sale, since the buyer does not then consent to buy, and will forfeit the deposit if he elects not to do so, the deposit begins to look very much like a payment made for an option. As


\textsuperscript{31} 2 Colin, Capitain et de la Monandiere, op. cit. supra note 8, at n° 838; 11 Beudant, Cours de Droit Civil n° 327 (1924).
in the case of a deposit of earnest money, if the purchaser of the option decides not to take it up, he simply loses what he paid for it. It does not follow from this, however, that the purchase price of an option should be counted as earnest money. The basic reason for this is that the sum paid for an option is not put up as a forfeit but as the whole price of the option, that is, the right which the purchaser acquires to buy the property. This right is the "thing" for which he pays. He is buying a right and if he chooses not to use it that is his affair. Even if it should be agreed that, if he elects to use it, the amount paid for it will be applied to the purchase price, its character is not changed. The right he acquires can be sold like any credit. It would be wholly unsound to say that one to whom an option is assigned, for example, would acquire merely the right to a return of what was paid for it by the assignor. Such an assignment might be made for a price well in advance of what was paid for it, which in fact, frequently happens. If the price paid for an option is to be counted as earnest money, the option giver will also have the power to withdraw so that the purchaser will not get what he is paying for, namely, the right to purchase the property. This is the true difference between the purchase of an option and the deposit of earnest money in connection with a unilateral promise of sale. In the final analysis it is simply a matter of intention. A payment made for an option is not designed to afford a mutual power of withdrawal. And this suggests that the adoption of any mechanical rule in this area would be undesirable.

The obvious way to avoid this difficulty is to recognize that a buyer may put up forfeit money at the time he is granted an option if that is his intention, but that if it appears he is simply paying for an option as he might pay for any object of his desire, a finding that the payment constitutes earnest or forfeit money would be precluded. Presumably this situation would be dealt with in this fashion in France where the intention of the parties is controlling and a deposit is counted as forfeit money only when there is no contrary manifestation. The presumption is overcome when the deposit is made as part payment of the purchase price or is put up to bind the sale.32 And, of course, the result

32. It is believed that this view is uniformly held by the French despite some expressions seemingly to the contrary. See Capo v. Bugdahl, 117 La. 962, 42 So. 478 (1906). This case seems to have constituted the principal authority for the express overruling of Provenzano v. Claesser, 122 La. 378, 47 So. 688 (1908), where a payment "on account of purchase price" was flatly held not to constitute a deposit of earnest money, by the case of Maloney v. Aschaffenburg, 143 La. 509,
in France would be the same if, when the promisee in a promise of sale takes up his option, he then makes a part payment on the purchase price.

But the problem in Louisiana is not so simple. We have not related the giving of earnest money to a unilateral promise of sale in the sense of an option. We have applied it to bilateral agreements. Some cases in our jurisprudence that treated the question of earnest money as involving a finding of intention have now been disapproved. By a line of authority which has been consistent for some time any payment made in connection with a contract to sell an immovable is considered forfeit money unless a contrary intention is manifested. As the rule is stated it is applicable only when the deposit is made in connection with a contract to sell. Since our jurisprudence has assimilated the unilateral promise of sale to a bilateral contract to sell the rule may be said to apply to a promise of sale, but only in the sense of a bilateral exchange of promises. However, if with us a promise of sale is bilateral in nature, we are left with no statement of the applicability of the theory of earnest money to options. Consequently we remain free to say that that which a prospective buyer pays for an option is not earnest or forfeit money as suggested hereinabove. And there is authority for this view.

78 So. 761 (1917).

An examination of 3 Mourlón, Examen du Code Napoléon § 489 (1856) and 24 Laurent, Principes de Droit Civil (1877), cited in Capo v. Bugdahl, indicates that both of these authors would have applied the presumption of earnest money only where the agreement was silent with respect to what the parties intended. For example, "Les parties sont, sans doute, libre de manifester une volonté contraire; celle qui s'oppose à ce que la promesse soit retiré est admise à prouver que les arrhes ont été données comme denier à Dieu ou comme d-compte . . ." 3 Mourlón, op cit. supra. In Capo v. Bugdahl there was no mention that the deposit was made as part payment of the purchase price or to bind the sale, which fact would lend some support to the application of the presumption, and it is interesting to note that the organ of the court in that case also wrote the opinion in Provenzano v. Glaesser, supra which held that a part payment of the purchase price was not forfeit money. In both Smith v. Hussey, 119 La. 32, 43 So. 902 (1907), and Legier v. Braughan, 123 La. 463, 49 So. 22 (1909), there was an express statement, in the former, that the deposit was put up to bind the sale, and in the latter, as part payment of the purchase price. This would distinguish each of these cases from Capo v. Bugdahl.

A recent expression of the point of view here stated appears in 3 De La Moran-Diere, Droit Civil, no 24 (1958): "Article 1590 [La. Civil Code Art. 2463] is simply interpretative of the presumed intent of the parties. It may result from the terms that it [the deposit] is given as proof of the sale or on account of the purchase price, in which case neither party has the privilege of withdrawal." Accord: 2 Planiol, op. cit. supra note 2, at no. 1390.

33. See Breaux v. Burkenstock, 165 La. 286, 115 So. 482 (1928); and cases cited supra note 32. See also Hebert, The Function of Earnest Money in the Civil Law of Sales, 1 Loyola L. J. 121 (1930).

On the other hand, there is no reason why, if a seller gave a buyer an option to buy certain property at a given price, he could not exact a deposit from the buyer with the understanding that if the buyer decided not to exercise or take up the option he would simply forfeit the deposit, and that if the seller elected not to sell he would return the double. The agreement is here framed so as to demonstrate that the buyer is simply putting up forfeit money, not buying an option, the difference being that when he puts up earnest money he is making it possible for the seller to withdraw as well as himself, but when he buys an option he acquires an irrevocable power to buy the property, and the seller becomes irrevocably bound to sell it to him if he elects to take up the option. This sort of an agreement would be unusual here in Louisiana, but it constitutes a definite legal possibility as it does in France.

Although the French may be concerned with whether or not a deposit of earnest money will operate to suspend the transfer of ownership, this question, it appears, could not arise in Louisiana, insofar as immovables are concerned, because of the rule that ownership does not pass on the basis of a bilateral agreement to sell and to buy where the parties contemplate the execution and delivery of an act of sale at a later date. Consequently when a deposit is put up in Louisiana in connection with a contract looking toward the transfer of an immovable at a later date, title does not pass. This is simply the result of the stated rule, and not because it is found that the parties by putting up earnest money have manifested an intention to suspend the transfer of ownership. Actually we seem to put the cart before the horse. In France a finding that a deposit is earnest money results in a suspension of the transfer of ownership. Here a finding that ownership does not pass by the agreement results in a finding that a deposit is earnest money. The result is the same with us, therefore, as with the French, but the reasoning is wholly dissimilar.

The question could arise, however, in a transaction involving a movable because we follow Article 2456 in such cases and consider the sale as perfected between the parties when there is an agreement for the object and the price thereof although the thing has not yet been delivered and the price has not been paid. If

we should follow the French view, that a deposit of forfeit money operates to suspend the transfer of ownership until the parties forego the power of withdrawing and perform instead, it would not be necessary for us to concern ourselves with whether the deposit is put up in connection with a contract to sell or a sale, since in any case where it is put up the transaction could not amount to a sale, but would be a simple contract to sell. For example, let's assume that A selects a particular car at a used car lot, makes a deposit of $100.00 on the price, and agrees to return Saturday with the remainder and take the car. If the deposit is earnest money, and the view is followed that such a deposit operates to suspend the transfer of ownership, the sale would be suspended notwithstanding the concurrence of thing, price, and consent. In determining whether the deposit should be counted as earnest money it would not be proper to apply the rule stated in cases involving immovables, i.e., that any money put up in connection with a contract to sell is earnest money. The application of this rule would require an inquiry into whether the agreement concerning the car amounted to a sale or a contract to sell. As stated above, such a question where movables are involved is usually resolved by an application of the principle stated in Article 2456. If the parties are dealing with a specific thing, and the agreement calls for no performance by the seller other than delivery, and a price is agreed upon, then the sale is considered to be perfect and the property is acquired of right by the buyer with respect to the seller. In the example given the thing is specific and the price is agreed upon, consequently ownership would pass under the article. This being true, an application of the rule as stated in cases involving immovables would require the holding that the deposit was not earnest money because it was put up in connection with a sale instead of a contract to sell. Yet the situation is one where earnest money could well be deposited if the parties so desired, and where they might well be presumed to have so intended in the absence of a contrary manifestation of intention. The forfeiture of earnest money put up under a bilateral contract is a substitute for performance. It is only when the election has been made between performance and forfeiture that earnest money passes out of the picture. Therefore, until performance has been rendered each party may elect instead to forfeit the amount deposited as earnest. In the used car case, even if it be said that ownership passes because the parties have

agreed on a specific thing for a fixed price the buyer has not yet paid the price nor has the seller delivered the car. These are the performances in question and, treating the deposit as forfeit money, either party might elect forfeiture in lieu of rendering them. Consequently, if any deposit made in connection with an agreement for the sale of a movable is to be presumed earnest money, instead of applying this presumption to a contract to sell, as in cases involving immovables, it ought to be applied, if at all, to an executory contract, meaning one where the basic obligations of delivery and payment remain unperformed, and this without reference to whether or not, as a purely legal proposition, ownership may be in one party or the other. But a sounder view, more in accord with the probable intentions of the parties and less calculated to be productive of difficulties, is that a deposit of earnest money, as with the French, operates as a suspensive condition to the perfection of the sale. A determination that the parties meant the deposit to be earnest money would then depend solely on an absence of a contrary manifestation of intention.

The writer has never been sympathetic to the rule that, in the absence of a stipulation to the contrary, any money deposited in connection with a contract to sell is earnest money. There is no discernible public policy supporting such a broad presumption. The parties should have full control over their agreement in this respect, and if they state that the payment is made as part of the purchase price or to bind the sale, this should preclude the conclusion that it was made as a forfeit to preserve the power of withdrawal. In other words, a deposit should be counted as earnest money only where there is no contrary manifestation by the parties. The basic objection to the broad presumption is that its application too often does violence to the manifest intention of the parties. If it is applied to facilitate the disposition of cases of this kind, it ought to yield to a contrary showing of intention which would be consistent with the way the French handle such problems. Of course, the broad presumption, which requires language specifically negating the intention to deposit earnest money, may afford some certainty to lawyers who may be called

37. It is no answer to say, as did Chief Justice O'Neill in Maloney v. Aschaffenburg, 143 La. 509, 78 So. 761, 765 (1917), that, "The giving of earnest money is always intended to be a part of the purchase price if the sale be consummated; and it is, or ought to be, always intended that the sale be consummated." Of course, if the money is not forfeited by the buyer because he does not elect to withdraw, it would doubtless be applied to the purchase price. But this does not overcome the fact that if the parties say that the deposit is part payment of the purchase price they are thereby indicating that it is not being put up as a forfeit to secure a privilege of withdrawal.
in to determine the legal effect of a contract entered into without
their aid, or to the courts in disposing of such problems, but it
perhaps came as a shock to Breaux, and others, who had put up
a portion of the purchase price “to bind the sale” to discover that
they were actually unbinding it by putting up the money.38

This is exactly what happened again in a recent case39 where
an option granted in a lease required the lessee, upon exercising
the option, to pay ten percent of the purchase price. In due
course he elected to take the property and, as required, paid the
ten percent. In consequence his subsequent attempt to secure a
judgment ordering a conveyance of the property failed. Under
the rule as it is framed he was doomed to failure.

In the first place there was simply an option, or promise of
sale, which created in the lessee a legal power to convert the
option into a bilateral contract to sell the property to him at his
election. An effective exercise of the power required in addition
to the lessee’s acceptance in writing, the payment of the ten per-
cent. The lessee acted accordingly, and when he did, the option
or promise of sale then amounted to a sale in the sense that,
according to our Code, the offeree was entitled to specific per-
formance, which is another way of saying that the option was
converted into a contract to sell, which normally would be specif-
cally enforceable. But then the making of part payment of the
purchase price led to the application of the rule that any money
put up in connection with a contract to sell is presumed to be
earnest money in the absence of a contrary stipulation. Conse-
quently, since the contract resulting from the exercise of the
option was a contract to sell rather than a sale, the deposit was
held to constitute earnest money.

The reason that a decision of this kind may be disturbing is
that it seems to be clearly contrary not only to what was contem-
plated by the lessee but to the requirements of justice. The lessee
had given value for his option by taking the lease, and then, when
he sought to avail himself of the benefit for which he had paid
by making part payment of the purchase price, he discovered
that his recourse was limited to a return of double the deposit
he was required to make to establish his right granted by the
option. He had bought not the right to acquire the property, but

38. Breaux v. Burkenstock, 165 La. 206, 115 So. 482 (1928); Capo v. Bugdahl,
117 La. 902, 42 So. 478 (1906); Smith v. Hussey, 119 La. 32, 43 So. 902 (1907);
Legier v. Braughan, 123 La. 463, 49 So. 22 (1909).
merely the right to recover ten percent of the purchase price, and in order to establish his right to this he would have to first put up ten percent of the purchase price. Some sting may be removed from a situation of this kind by the recovery of double the deposit, and the writer suspects that this fact has had much to do with the tenacity of the presumption, but the recovery may not actually assuage the wrong the option holder may feel has been done to him by the legal rule which stands in the way of his getting the property itself.

There may be some difference between this situation and one where there is no preceding option but, instead, a bilateral contract to sell accompanied by the payment by the purchaser of a portion of the purchase price, but this is by no means clear. Possibly, the latter case may lend itself more realistically to the impact of the presumption, but that is all. There is merit, of course, in adhering to a rule of the kind under consideration, but the degree thereof remains a subject of proper inquiry. This has not always been the rule. And if it was changed once it can be changed again. It is believed that the way out of the difficulty posed by the case discussed lies not in trying to distinguish between a promise of sale and an option which are, it seems clear, actually the same, but in restricting the presumption that a payment accompanying a contract to sell will be earnest money to the case where it does not appear that it was made to bind the sale or as part payment of the purchase price; or more broadly where there is no indication why the payment was made.

It does not seem an adequate answer to say that the right to specific enforcement can always be reserved. Where the parties contract with benefit of counsel this may be realistic and sound, but otherwise it cannot be, because it is not calculated to produce a result consistent with the intentions of the parties, and there is no real justification for saying that their intentions should not be given effect.

The rule that an agreement for the sale of an immovable, where the parties contemplate a formal act of sale at a later date, is to be treated as a contract to sell or convey the property at the date agreed upon is perhaps a sound one despite the contrary French view. Some common law jurisdictions have come around to it as a matter of case law and a uniform act to this effect has

40. Provenzano v. Glaesser, 122 La. 78, 47 So. 688 (1908), and authorities there cited.
41. See the dissenting opinion of Tate, J., in Haeuser v. Schiro, 235 La. 909, 106 So.2d 306 (1958).
been proposed. From a practical point of view it seems to work better. Its application does not offend what the parties actually intend. The chances are that most laymen would not count themselves as owners of an immovable until the accomplishment of an act of sale.

It might well be, also, that a similar view with respect to sales of chattels would be better, and that ownership and risk of loss should not pass to the buyer until delivery or tender thereof. Under the rule *res perit domino* ownership bears on risk, but it also bears on the right of third parties who deal with the seller in possession and the remedies available to the buyer in the event of a breach by the seller.

As far as risk is concerned it would accord better with the practicalities of the case to keep it on the seller remaining in possession until delivery. The use of insurance is so widespread these days that if the risk remains on the seller the loss will ultimately be borne in all likelihood by one who has been paid to assume it. Surely it is more likely that the seller in possession will have insurance to cover his interest in the property than will the buyer, and it is not too likely that his policy will cover the latter's interest. If the seller's interest is a whole interest because the entire risk is in him, he will be fully protected and the buyer will not have to suffer any loss. The cost of the insurance to him can in turn be reflected in the price to the buyer.

Whether or not title passes to the buyer by the agreement, the court could declare him owner and direct the seller to surrender possession of the thing. The obligation to deliver a specific existing thing is an obligation to give as opposed to an obligation to do. But, even if the buyer may not be the owner and entitled to possession as such, the law could recognize his right to a specific enforcement of the seller's duty to deliver where the thing is specific and no further action beyond surrender of possession is required of him. That is, such a right does not have to be made to rest on ownership. And the same could be said of a recovery of the price by the seller. The civil fruits of the movable could follow the ownership, as presently provided, or the law could provide that they would belong to the buyer.

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42. See Uniform Vendor and Purchaser Risk Act (1935).
44. 2 Colin, Capitant et de la Morandiere, *op. cit. supra* note 8, at no 155.
45. La. Civil Code arts. 498, 545, 2489 (1870).
from the time the contract was formed subject to any contrary agreement. Finally, the rights of third parties, including creditors, are adequately protected under the present system\textsuperscript{46} and if ownership should remain in the seller until delivery, adequate protection to the buyer could be provided.

It is interesting to notice that the proposed Uniform Commercial Code has taken account of the practicalities of the problem from a commercial point of view by abandoning the principle \textit{res petit domino}. Risk has been separated from title and, in general, in transactions between merchants, remains on the seller where there has been no breach as long as the seller remains in possession of the goods. By way of explanation, the comment of the draftsmen states, "The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them."\textsuperscript{47} It is further recognized as "extremely unlikely" that the buyer will carry insurance on goods not in his possession. Where, for example, the goods are at the time of contracting already identified, and no documents are to be delivered, title passes at the time and place of contracting, but at the same time, if this is a transaction between merchants, risk will not pass to the buyer until his receipt of the goods. In general, likewise the buyer's right to specific performance is dealt with independently of title\textsuperscript{48} although he may maintain replevin on the basis of ownership if it appears that he cannot readily effect cover and the goods have been identified to the contract. The comments of the draftsmen make it clear that the concept of "title," which involves also the problem of "sale," is dealt with not because of the legal relationships and their consequences as between buyer and seller, but because of the possible impact of any public regulation considered by the courts as incorporating the "private" law.\textsuperscript{49}

Of course, the Louisiana Civil Code identifies risk with title and the case law is consistent. In the case of immovables the jurisprudence, in apparent disagreement with the Code, keeps the risk on the seller until delivery, through the delivery of an act of sale to the buyer. As far as movables are concerned the jurisprudence is with the Code — ownership passes upon the per-

\textsuperscript{46} Id. arts. 1922, 1923.
\textsuperscript{47} Uniform Commercial Code § 2-509 and comments (Official Text 1957).
\textsuperscript{48} Id. § 2-716.
\textsuperscript{49} Id. § 2-401 and comment 1.
fection of the contract where the parties are dealing with identified goods and only a surrender of possession remains, and the risk likewise shifts under the principle *res petit domino*. Of course, it is not being here suggested that, because the jurisprudence has adopted the view that delivery of an act of sale is required to pass title to an immovable, it should be held likewise that delivery of a movable is required to pass ownership. The comments here made are designed to point out that consideration might well be given to the adoption of such a principle when the possibility of a change is under study.

The rule, apparently recognized in the jurisprudence, that the price paid for an option is not earnest money, seems to constitute an accurate reflection of the understanding of the parties. The same cannot be said of the rule which converts a payment of a part of the purchase price, or a payment to bind the sale, into a payment of earnest money in the absence of a stipulation to the contrary.

By virtue of the last amendment to Article 2462 of the Civil Code, the giver of an option cannot bind himself by his will alone as he can in France. A binding option requires "consideration." This well may be sound policy. When a person gives an option to another he seriously limits his legal freedom and affords the promisee a speculative advantage during the period allowed for its exercise. An increase in the value of the property will benefit only the latter in the event he chooses to take up the option. If he has not in some fashion paid for it, he has all to gain and nothing to lose, since by simply allowing the option to expire he avoids the consequences of a decrease in value. Under our law the option holder possesses a valuable property right and, from a business point of view, it is by no means manifest that such an acquisition should be made without cost. The fact that both Pothier and Planiol in giving examples of a promise of sale attach it respectively to a sale of other things, and to a lease, may be indicative of similar thinking or, at least, a use in practice consonant with this feeling. In each of these illustrations the promisor does receive something in return. However much importance the redactors of the French Civil Code may have attached to the juristic efficacy of the will, there may be some justifiable limits to the application of this theory in business transactions. The law as an instrument of equity may find it necessary sometimes to indulge lack of foresight and discourage overreaching. Assum-
ing, therefore, that the amendment in question was designed to depart from the system of the French Code, this may have been a wise course.

At the same time, there is much to be said in favor of a system under which an offeror may not be deemed privileged to revoke his offer without allowing a reasonable time for its acceptance where the circumstances are such that the offeree is justified in believing that the offeror so intends. Such a rule simply protects the offeree's reasonable expectations which is the prime purpose of the law of contract. The Uniform Commercial Code is positive evidence that the modern tendency is in this direction. It recognizes that irrevocable firm offers may be made by a merchant without the necessity of consideration. A maximum period of three months is allowed. The comment makes it clear that the principle is not designed to apply to long term options. Thus is the line drawn between options and irrevocable simple offers. The approach is a sensible and practical one. The period chosen has the authority of the Uniform Commissioners and the American Law Institute behind it. Presumably the choice was a sound one. It seems clearly adequate to reach most cases where time for acceptance is required to satisfy the commercial necessities of the transaction in question. It guards against improvidence on the part of the offeror as well as his possible entrapment by the offeree. Indeed, a further precaution against the latter exists in the requirement that, where the offeror uses a form supplied by the offeree, he initial the provision in question.

If Article 1809 of the Louisiana Civil Code no longer applies to offers to sell, we have surrendered a basic principle of the civil law that is now finding acceptance by our sister system. Is this the way we want it?

50. Id. § 2-205.